Supreme Court, U.S.
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No. 85-1617

In The
Supreme Court of the United States
October Term, 1985

EMERSON ELECTRIC CO.,

Petitioner,

v.

JANET SWENSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTION PRESENTED

Did the Minnesota Supreme Court properly find that the Consumer Product Safety Commission reporting rules found at 16 C.F.R. Part 1115.10 are "any other rule or order" within the meaning of 15 U.S.C. Sec. 2072(a) (Consumer Product Safety Act), the breach of which can be the basis for a private cause of action?

TABLE OF CONTENTS

	Page
I. Statement of the Case	1
II. Procedural History	3
III. Statutory Authority	3
IV. Summary of Arguments	5
V. The Decision Below Conforms with U.S. Supreme Court Rulings That Violation Of A Rule —Substantive Or Interpretive—Has The Force And Effect of Law If It Reasonably Interprets Statutory Authority	6
VI. The Language Of The Consumer Product Safety Act (15 U.S.C. Sec. 2072(a)) and the Legislative History Compel a Conclusion that a Violation of the Reporting Rules of the CPSC Authorize a Private Suit	10
VII. There Is No Important Question Of Federal Law Subject To Review. The Same Issues Have Been Decided By This Court In Earlier Decisions	11
VIII. Rebuttal to Collateral Issues Raised by Petitioner	11
IX. Conclusion	14

TABLE OF AUTHORITIES

Page

CASES:

Chysler Corporation v. Brown, 441 U.S. 281 (1979) 9

Drake v. Lochinvar Water Heater, Inc., 618 F. Supp. 549 (D. Minn. 1985) (appeal docketed, No. 85-5179-Mn (8th Cir. 1985)) 13

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 6

Granville House, Inc. v. Department of Health and Human Services, 715 F.2d 1292 (8th Cir. 1983) 7

Kahn v. Sears Roebuck & Co., 607 F.Supp. 957 (N.D. Ga. 1985) 13

Lilly v. Grand Truck R. Co., 317 U.S. 481 (1943) 7

Morris v. Coleco Indus., 587 F.Supp. 8 (E.D. Va. 1984) 13

Mourning v. Family Publications Service, 411 U.S. 356 (1973) 6

Payne v. A.O. Smith Corporation, 578 F.Supp. 733 (S.D. Ohio 1983) 13

Production Tool Corporation v. Employment and Training Administration, 688 F.2d 1161 (7th Cir. 1982) 7

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 6, 7, 11

United States v. Bacto-Unidisk, 394 U.S. 784 (1969) 7

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) 1, 5, 6, 11

Wilson v. Robertshaw Controls Co., 600 F. Supp. 671 (N.D. Ind. 1985) 13

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS:

5 U.S.C. § 551(4) 8

5 U.S.C. § 553 8

15 U.S.C. § 2064(b) 3, 9

15 U.S.C. § 2072(a) 1, 3, 10

15 U.S.C. § 2076(e) 4, 5, 9

16 C.F.R. Part 1115.10(a) 1, 4, 5, 9, 11

43 Fed. Reg. 34990 (1978) 9

49 Fed. Reg. 13820 (1984) 13

49 Fed. Reg. 13821-2 (1984) 13

H.R. Rep. No. 1592, 92nd Cong., (2d Sess. 22 (1972) 10

H.R. No. 15003, 92nd Cong., 2d Sess. § 231 (a)(1), (2) (1972) 10

Cong. Rec.-House, Sept. 20, 1972, p. 31402 10

MISCELLANEOUS:

Davis, 2 *Administrative Law Treatise*, § 7:13 (1979) 7

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Respondent opposes Emerson Electric's petition for a Writ of Certiorari to the Minnesota Supreme Court on the grounds that:

1. The Minnesota Supreme Court's decision properly follows this court's decision in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) that a violation of an interpretive rule may have the force and effect of law.
2. The Minnesota Supreme Court properly decided that the violation of the Consumer Product Safety Commission rule, found at 16 C.F.R. 1115.10(a), constitutes a violation of "any other rule" as required by 15 U.S.C. Sec. 2072(a).
3. The Minnesota Supreme Court's opinion is entirely consistent with this court's previous rulings—thus, no new issue is before this court.

———o———

OPINIONS BELOW

The opinions of the Minnesota Supreme Court, Minnesota Court of Appeals and trial court are attached to Petitioner's brief at Appendix A through C.

I. STATEMENT OF THE CASE

This is an interlocutory appeal. Trial has been set for September 8, 1986.

On September 10, 1979, Edward Swenson was killed by an LP gas explosion while attempting to light an A.O. Smith water heater. Swenson claims the explosion was caused by a gas leak through the Emerson control on the A.O. Smith water heater. Plaintiff claims both Emerson and A.O. Smith have known since the mid 1960's—long prior to the manufacture of the subject control—that contaminants enter gas controls through the gas line and can cause gas leaks resulting in explosion. A filter, designed to filter out these contaminants, was designed prior to the date the subject control was manufactured. Emerson and A.O. Smith nevertheless elected not to employ this filter because of price and other considerations. An A.O. Smith employee in 1971 admitted the seriousness of potential injuries due to gas leakage caused by contaminated controls; however, no action was taken until one year prior to the instant explosion. In 1978, Emerson and A.O. Smith incorporated a built-in filter on all LP gas controls. The filter was designed to filter out the leakage-causing contaminants. A number of claims, explosions and lawsuits occurred prior to the instant explosion, believed to be caused by contaminated Emerson gas valves; yet neither Emerson nor A.O. Smith recalled the product or contacted the Consumer Product Safety Commission until 1980. The subject control was recalled in 1980, one year post-explosion.

Respondent Swenson asserts the following claims against Emerson and A.O. Smith.

a. Negligence,

b. Strict liability in tort,

c. Punitive damages for conduct considered to be callous disregard for the safety of the consuming public,

d. Violation of the Consumer Product Safety Commission reporting rules. (The issue now on appeal).

II. PROCEDURAL HISTORY

Action on behalf of Janet Swenson and her four minor children for the death of her husband Edward was commenced in 1981. On June 6, 1983, she amended her complaint alleging a violation of the reporting requirements of the Consumer Product Safety Act (this was later amended to allege a violation of the reporting rules of the Consumer Product Safety Commission—in accordance with court order).

III. STATUTORY AUTHORITY

Congress in enacting the Consumer Product Safety Act included a provision at 15 U.S.C. Sec. 2072(a) which states:

> "(a) *any person* who shall sustain injury by reason of a knowing (including willful) violation of a Consumer Product Safety Rule, *or any other rule or order issued by the Commission* may sue any person who knowingly (including willfully) violated any such rule or order . . ." (Emphasis added)

The Act also requires manufacturers to report certain conditions in 15 U.S.C. Sec. 2064(b) (Section 15(b) of the Act):

> "(b) Every manufacturer of a consumer product distributed in commerce and every distributor and retailer of such product, *who obtains information which reasonably supports the conclusion that such product:*

(1) fails to comply with an applicable consumer product safety rule; or

(2) *contains defect which could create a substantial product hazard* described in subsection (a) (2) of this section.

shall immediately inform the Commission of such failure to comply or of such *defect* unless such manufacturer, distributor or retailer has actual knowledge that Commission has been adequately informed of such defect or failure to comply." (Emphasis added)

In addition, the Act expressly authorized the Commission to adopt rules requiring manufacturers to report certain information to the Commission. The Act provides at 15 U.S.C. Sec. 2076(e) as follows:

"The Commission may by rule require any manufacturer of consumer products to provide to the Commission such *performance* and technical data related to *performance* and *safety* as may be required to carry out the purposes of this act." (Emphasis added)

Pursuant to the authority granted to it by Sec. 2076(e) of the CPSA, the Commission has promulgated reporting rules, including 16 C.F.R. Part 1115.10(a):

"Every manufacturer . . . of a consumer product that has been distributed in commerce *who obtains information that such consumer product contains a defect which could create a substantial risk of injury* to the public shall *immediately notify the . . . Consumer Product Safety Commission . . .*" (Emphasis added)

Swenson claims that Emerson and A.O. Smith violated this rule. Emerson, in its defense states numerous convoluted issues and plays word games concerning the

effect of "interpretive guidelines," all in an apparent effort to obfuscate the straightforward issue.

IV. SUMMARY OF ARGUMENTS:

Respondent will analyze the issue in several steps:

1. 16 C.F.R. Part 1115.10(a) is enforceable by a private cause of action whether it is considered legislative (substantive) or interpretive because it fairly interprets the statute. Interpretive rules can have the force and effect of law. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

2. A review of the legislative history will show that Congress intended a broad range of private causes of action to be created by the Act. Thus, the Court should feel confident in giving the clear language of the Act which states "any other rule" its simple interpretation to include the rule developed by the Commission that is contained in 16 C.F.R. Part 1115.10(a).

3. The rule in question (16 C.F.R. Part 1115.10(a)) was adopted pursuant to specific legislative authority (15 U.S.C. 2076(e)).

4. Petitioner's Writ of Certiorari does not raise important questions of federal law nor does it involve a federal question which conflicts with applicable decisions of this Court. Thus, in accordance with Rule 17 of the Supreme Court Rules Certiorari should not be issued.

V. THE DECISION BELOW CONFORMS WITH U.S. SUPREME COURT RULINGS THAT VIOLATION OF A RULE—SUBSTANTIVE OR INTERPRETIVE —HAS THE FORCE AND EFFECT OF LAW IF IT REASONABLY INTERPRETS STATUTORY AUTHORITY.

This Court has ruled that an agency rule, whether substantive or interpretive, which reasonably interprets statutory authority has the force and effect of law. *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 (1980). In *Whirlpool,* the Occupational Health and Safety Administration promulgated a rule that employees could walk off the job when faced with an unsafe work place condition. When they did so the employer officially reprimanded them. The employees sued seeking an injunction against the reprimand, claiming their actions were sanctioned by federal law (the above referred to OSHA rule). The employer claimed the OSHA rule was merely interpretive and, thus, unenforceable. Nothing in the Act explicitly provided for such a rule. However, this Court held that because the regulation clearly conformed to the fundamental objective of the Act, even though interpretive, it should be given the force and effect of law. This Court stated:

> "The question before us is whether this *interpretive* regulation constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that *the regulation is entitled to deference unless it can be said not to be reasoned and supportable interpretation of the Act. Skidmore v. Swift & Co.,* 323 U.S. 134, 139-140. *See Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555; *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356." (Emphasis added)

Id. at 11. This Court gave the regulation the force and effect of law and further stated:

> "The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme. In the absence of some contrary indication in the legislative history, *the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. United States v. Bacto-Unidisk,* 394 U.S. 784, 798; *Lilly v. Grand Truck R. Co.,* 317 U.S. 481, 486." (Emphasis added)

Id. at 13.

The rule of law is clear. Even if the reporting requirements are considered interpretive, they have the force and effect of law if they reasonably interpret the statute (CPSA). *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944); *Granville House, Inc. v. Department of Health and Human Services,* 715 F.2d 1292 (8th Cir. 1983); *Production Tool Corporation v. Employment and Training Administration,* 688 F.2d 1161 (7th Cir. 1982); Davis, 2 *Administrative Law Treatise,* Sec. 7:13 (1979).

This Court in *Skidmore* confirmed that interpretive rules can be given great weight. The Court stated.

> "The weight of such a judgment [an interpretive rule or decision] in a particular case 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

Id. at 140.

The court in *Production Tool Corporation v. Employment Training Administration,* 688 F.2d 1161 (7th

Cir. 1982) noted that the rule at issue in that particular case had been subject to the notice and opportunity to comment provision of 5 U.S.C. Sec. 553, Administrative Procedures Act, and state as follows:

> "The interpretation of a statute by the agency charged with enforcement or administration is entitled to great deference provided it is consistent with the congressional purpose . . . Deference is especially appropriate where, as here, the rule was adopted only after all interested persons were given notice and an opportunity to comment pursuant to § 553 procedures."

Id. at 1167.

The CPSC rule in question here was adopted pursuant to the rule making authority for legislative rules found in the Administrative Procedure Act (5 U.S.C. Sec. 553). This requires published notice of the Commission's intention to adopt the rules and the allowance of a time for comment. The Consumer Product Safety Commission did publish such proposed rules and did allow time for comment. If the Commission wished to adopt unenforceable rules only, it need not have published this notice nor requested comment. The fact that it did publish and request comment, and that it complied with the Administrative Procedures Act for passage of substantive rules, is strong evidence to substantiate a finding that the reporting requirement rules should have the force and effect of law.

It should further be noted that the word "rule" is defined in the Administrative Procedures Act at 5 U.S.C. Sec. 551(4) to include an agency statement which interprets law or policy.

There can be no question that the reporting rule is both authorized and fairly interprets the Consumer Product Safety Act. Section 2076(e) of the Act specifically authorizes the Commission to formulate rules affecting performance and safety of products. Section 15(b) of the act (15 U.S.C. Sec. 2064(b)) requires each manufacturer who obtains information that its product contains a defect which could create a substantial product hazard to immediately report same to the Commission. It is clear that this statutory authority has been reasonably interpreted by the Commission rules found at 16 C.F.R. Part 1115.10 (a) which requires each manufacturer who obtains information that its consumer product contains a defect which could create a substantial risk of injury to immediately notify the Commission. The Minnesota Supreme Court's finding that the substantial product hazard reporting regulations reasonably interpret the act cannot be successfully challenged.

It is interesting to note that the Consumer Product Safety Commission in publishing the rules stated: "In issuing these rules under § 15 of the CPSA the Commission believes it has reasonably interpreted the provisions and obligations of that section." 43 Fed. Reg. 34990 (1978).

Emerson's reliance on *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979) and other cases cited on page seven of their brief to sustain their claim that a violation of an interpretive rule cannot have the force and effect of law are misplaced. The *Chrysler* case does not stand for that proposition. The *Chrysler* case stands for the proposition that where the Department of Labor *does not have statutory authority to promulgate a rule* the rule is void and

unenforceable. See this Court's language at 441 U.S. 304, 306 and 307. In the instant case the reporting rules are clearly based upon appropriate statutory authority.

VI. THE LANGUAGE OF THE CONSUMER PRODUCT SAFETY ACT (15 U.S.C. Sec. 2072(a)) AND THE LEGISLATIVE HISTORY COMPEL A CONCLUSION THAT A VIOLATION OF THE REPORTING RULES OF THE CPSC AUTHORIZE A PRIVATE SUIT.

The Consumer Product Safety Act (15 U.S.C. Sec. 2072(a)) provides that any person may bring a private claim for the violation of a Consumer Product Safety rule or *any other rule* of the Commission.

The legislative history clearly shows that the first draft of this section was much more limiting. The original version of the house bill limited private claims to "Consumer Product Safety Rule" violations. (H.R. 15003, 92nd Cong., 2d Sess. § 231(a)(1) and (2) 1972). A later version of the house proposed bill allowed private claims for violation of a "Consumer Product Safety Standard, Regulation or Order issued by the Commissioner." (Cong. Rec.-House, Sept. 20, 1972, p. 31402). The Conference Committee of the Senate and House version and the final bill adopted by Congress allowed private claims for violation of "any other rule or order" issued by the Commission. (H.R. Rep. No. 1592, 92nd Cong., 2d Sess. 22 (1972)).

The word "any" must be given meaning. If Congress wished only substantive rules to form the basis of a violation it could have said so. It did not.

VII. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW SUBJECT TO REVIEW. THE SAME ISSUES HAVE BEEN DECIDED BY THIS COURT IN EARLIER DECISIONS.

Rule 17 of the Supreme Court Rules identifies three areas in which this Court will consider a Writ of Certiorari. Clearly neither subdivisions (a) or (b) are applicable. As of this date there is no other state appellate or federal appellate court decision on this issue.

Subdivision (c) does not apply in that the question of federal law raised by Defendant has previously been settled by this court in the *Whirlpool* and *Skidmore* cases. Petitioner's claim that interpretive rules can never have the force and effect of law is without merit and is contrary to the above-captioned opinions. There is no new issue raised by Petitioner not previously decided by this Court.

VIII. REBUTTAL TO COLLATERAL ISSUES RAISED BY PETITIONER.

1. Petitioner wishes to make this a political rather than a legal issue. It argues that there are too many product liability cases and cites a 758 percent increase in case filings since 1974. Yet only one case involving this CPSC issue has ever been ruled upon by any appellate court in the nation (the instant case). The Consumer Product Safety Act was passed in 1973. The reporting regulation (16 C.F.R. part 1115.10(a)) was promulgated in 1974. Defendant cites seven cases in which opinions on this issue have been written (plus the instant case). Of those seven cases five

federal district courts have sustained the cause of action; two have denied it.

Defendants make the flood gates argument—but where is the flood?

2. Petitioner claims that inclusion of the CPSC claim will significantly expand discovery, relevancy of evidence and trial. They have made the same claims below. They are wrong. Whether or not there is a separate cause of action for violation of the reporting rules of the CPSC this violation would be admissible into evidence as part of a product manufacturer's common law duty to warn and recall. It may not state a separate cause of action but is certainly a relevant standard of conduct which should be considered in a common law negligence case. The jury issue is not as presented by petitioner, whether the CPSC would recall the product—but whether under the guidelines of the CPSC the product manufacturer should recall the product on his own. Under these conditions there is no speculative guessing of what the Commission would do but a reasoned interpretation of rules and judgment as to what the product manufacturer should have done to serve the public safety.

3. Although the only new element of damage made available by the Act is collection of attorney's fees and costs it is believed that this cause of action will assist in the settlement of cases and clear many federal and state court calendars. The CPSC reporting rules create clear and concise

recall guidelines easily understood by lay juries. Product manufacturers who have intentionally violated these rules are (and should be) concerned about the jury's reaction to evidence of their INTENTIONAL violation of these rules. Only evidence of the most callous and reckless conduct will sustain this burden of proof. Retention of this cause of action will bring pressure to bear where it belongs—and get these cases settled.

4. As petitioner states, the CPSA is primarily intended to protect the public from defective products. Yet recent publications of the Commission strongly suggest that due to monetary restraints the Commission cannot fully perform its job and needs the help of private litigants. *See* comments printed at 49 Fed. Reg. 13820 (1984); and 49 Fed. Reg. 13821-2 (1984).

5. The trial court opinion of *Morris v. Coleco Indus.*, 587 F.Supp. 8 (E.D. Va. 1984) is not on point. In contrast to the present case, *Morris* involved an alleged violation of the statute—not the rule. The trial court in *Kahn v. Sears Roebuck & Co.*, 607 F.Supp. 957 (N.D. Ga. 1985) does not appear to have been aware of the instant case, or *Drake v. Lochinvar Water Heater, Inc.*, 618 F.Supp. 549 (D. Minn. 1985) (appeal docketed, No. 85-5179-Mn (8th Cir. 1985)), *Wilson v. Robertshaw Controls, Inc.*, 600 F.Supp. 671 (N.D. Ind. 1985), or *Payne v. A.O. Smith Corporation*, 578 F.Supp. 733 (S.D. Ohio 1983). Well reasoned opinions by federal trial judges in each case sus-

tained the CPSC claim. Nor did the *Kahn* court cite legislative history. Its logic is simply faulty and should not be followed.

IX. CONCLUSION

This petition raises nothing new that has not been previously decided and is premised upon erroneous logic. The petition for certiorari should be denied.

Respectfully submitted,

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